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State v. McMillan Respondent's Brief Dckt. 43302

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43302
Plaintiff-Respondent,)	
)	Kootenai County Case No.
v.)	CR-2011-20285
)	
NICOLE LOUISE MCMILLAN,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has McMillan failed to establish that the district court abused its discretion by revoking her probation?

McMillan Has Failed To Establish That The District Court Abused Its Sentencing Discretion

McMillan pled guilty to possession of methamphetamine and the district court imposed a unified sentence of five years, with two years fixed, and retained jurisdiction. (R., pp.60-62.) Following the period of retained jurisdiction, the district court suspended McMillan's sentence and placed her on supervised probation for two years. (R., pp.68-

72.) After McMillan violated her probation, the district court continued her on probation with the additional condition that she successfully complete the drug court program. (R., pp.103-05.) McMillan subsequently violated her probation a second time, and the district court revoked her probation, ordered the underlying sentence executed, and retained jurisdiction a second time. (R., pp.156-58.) Following the second period of retained jurisdiction, the district court again suspended McMillan's sentence and placed her on supervised probation for two years. (R., pp.163-65.)

Within three months, McMillan violated her probation a third time, by failing to attend CAPP and MRT Aftercare, using methamphetamine and heroin, absconding supervision, and being arrested for possession of a stolen vehicle in Thurston County, Washington. (R., pp.171-72, 211.) The district court finally revoked McMillan's probation and ordered the underlying sentence executed. (R., pp.213-14, 228-30.) McMillan filed a notice of appeal timely from the district court's May 5, 2015 order revoking probation. (R., pp.220-23.)

McMillan asserts that the district court abused its discretion by revoking her probation in light of her recognition that she has a substance abuse problem and desire to relocate to Massachusetts, where she has friends and family "who were not involved in drug use." (Appellant's brief, pp.3-4.) McMillan has failed to establish an abuse of discretion.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to

revoke probation, the district court must consider “whether the probation [was] achieving the goal of rehabilitation and [was] consistent with the protection of society.” Drennen, 122 Idaho at 1022, 842 P.2d at 701.

At the disposition hearing for McMillan’s third probation violation, the district court articulated the correct legal standards applicable to its decision and also set forth in detail its reasons for revoking McMillan’s probation. (5/4/15 Tr., p.18, L.9 – p.24, L.18.) The state submits that McMillan has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the May 4, 2015 disposition hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court’s order revoking probation and ordering McMillan’s underlying sentence executed.

DATED this 9th day of June, 2016.

/s/
KENNETH K. JORGENSEN
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of June, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/
KENNETH K. JORGENSEN
Deputy Attorney General

APPENDIX A

1 And what it is is that, you know, people who are lost,
2 people who are lonely, people who are afraid often fall
3 into a culture of drug use because that's where they're
4 accepted. For better or worse, that's where they find
5 others like themselves. Am I making an excuse for her?
6 No.

7 You know, what I'd like to ask you to do,
8 Judge, is to consider keeping her in jail a little bit
9 longer. It's true that, you know, for all the
10 allegations of absconding and all this stuff that was
11 in the report, she met with her probation officer on
12 April 20th knowing full well what would happen. And as
13 she says that's not the way she used to handle things.

14 Judge, you know, I know procedurally where
15 we're at in this case. I know it's a rather part of a
16 stretch to come before you and ask you to consider
17 probation again; two riders and then we have this other
18 stuff. On the other hand, what she's proposing to the
19 Court, the letter from her aunt in Massachusetts,
20 object -- I would propose objectively makes some sense.
21 A family. A clean, sober, tax-paying, hard-working,
22 normal family. About as far away from here as you can
23 get. It makes sense.

24 Judge, what I would ask the Court to consider
25 doing is this. I would ask the Court to consider as a

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1 pleads or admits and I impose sentence. It's not like
2 we have a dialogue. But the case goes back to November
3 of 2011 with possession of methamphetamine. Where the
4 task force was watching a particular house, a suspect
5 drug house. Ms. McMillan is I think seen leaving that
6 house and had a car stopped. And she had
7 methamphetamine on her.

8 Her prior history at that time -- I think she
9 was 21 years old when she got sentenced, first of all --
10 had been a series of runaway incidents when she was in
11 her middle teens and several petty thefts in those
12 years. She violated a no contact order in 2008 when she
13 was 17. She had a paraphernalia possession charge at
14 age 21 and a -- some kind of other felony controlled
15 substance. And I frankly don't remember whether she was
16 convicted of that or not. I think she was not. But
17 some other felony-type charge that I don't think ended
18 in conviction.

19 So that criminal history was not so terrible.
20 It's not anything to be proud of, but it's certainly not
21 the worst that the Court sees. But what was really
22 alarming was the social history for Ms. McMillan. She'd
23 been using methamphetamines since the ninth grade.
24 She'd been in juvenile detention before she'd been in
25 rehabilitation. She had had children and had lost those

1 sanction incarcerating her for a period of time and then
2 ending this case, commuting the sentence to time served
3 in local jail. Let her go. If she sticks around here
4 we're going to know it real quick. If she gets back to
5 Massachusetts, finds that new life that -- well, maybe
6 that would be the end of the tunnel for this very
7 pleasant young lady.

8 Thank you for hearing me, sir.

9 THE COURT: Thank you.

10 Having accepted your admissions to the four
11 allegations in the report of probation violations dated
12 April 23rd of 2015, it's the judgment of the Court that
13 you are in violation of that probation. I continue to
14 have the four factors of sentencing that we've talked
15 about before in my mind on this case. I have to think
16 about protecting society the best way we can. I have to
17 think about deterring you from this kind of conduct and
18 how to deter other people in similar situations as you
19 are. I have to think about the punishment that society
20 expects under all these circumstances. And I have to
21 think about how to help rehabilitation if it can be
22 aided by the Court.

23 This case, I have -- Ms. McMillan and I have
24 been together in court many times. And we've talked
25 many times about these things. And "talking" I mean she

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1 children because of the drug use and her lifestyle. Her
2 drug use included the use of alcohol. It was
3 methamphetamine and marijuana daily since -- at times
4 anyway, daily since the middle teen years. At age 18
5 she started into heroin a bit. There'd been some
6 ecstasy use. There'd been some prescription drug abuse.
7 It was just the -- really the broad range of drug
8 addiction and drug use.

9 Now I forget. Did you ever go to the Walker
10 Center? Did you seek treatment there, or was that a
11 plan at one time?

12 MS. MCMILLAN: I went to Port of Hope. I went
13 to Port of Hope before I was ever even on felony
14 probation back in 2011. Like actually like six months
15 before I (unintelligible), I turned myself in at Port of
16 Hope wanting help. I mean, I've always wanted to not
17 use.

18 THE COURT: All right. I had the word Walker
19 Center down here, and I forget whether you'd ever gone
20 or not.

21 The other thing that began that was alarming
22 for the Court was that Ms. McMillan failed to appear
23 December the 28th for her PSI interview after she pled
24 guilty. She had had a car wreck the day before that
25 appointment, but she also admitted that she'd been

1 smoking marijuana the night before. She missed her
2 appointment the next day. She didn't come home for a
3 while, as she admitted even later to using
4 methamphetamine. I think people finally -- she finally
5 showed up when people caught up with her on January the
6 3rd of 2012. She did her PSI interview and then back on
7 the run, out away from court and on the run, so to
8 speak. A warrant was issued for her arrest. And
9 subsequently she was arrested.

10 And it was based really on that history that
11 the Court used a first retained jurisdiction program in
12 March of 2012. Based on a reasonably good report, we
13 tried probation at the end of July of 2012. She within
14 not quite -- well, I think just a year. It was August
15 of 2013 a probation violation came in. She had not
16 maintained employment as had been ordered by the Court.
17 She was associating with individuals that were
18 prohibited by her probation officer. And she had
19 absconded from her probation. She went on the run.

20 The Court reinstated probation at that point
21 with the new condition of drug court. That was on
22 September the 20th of 2013. Gave her two new years of
23 supervised probation to try it on drug court. Again,
24 less than a year later, end of July of 2014, she had
25 been terminated from drug court, again was associating

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1 with individuals prohibited by her probation officer.
2 She had changed her home residence without her probation
3 officer's permission or knowledge. She'd been using
4 methamphetamine again had it not dropped off the
5 supervision rolls.

6 And so the Court used a second rider in August
7 of 2014. And, again, after a reasonably good report,
8 tried two new years of probation on January the 9th of
9 2015. And now we have, and sadly before the Court, what
10 appears to be some evidence of new crimes being
11 committed in Thurston County, Washington, while being on
12 the run, absconding from probation, not doing her
13 treatment, missing office appointments and more use of
14 methamphetamine and heroin while -- which led to being
15 on the run.

16 And so when I weigh all these things together,
17 I have to think about the protection of society. And I
18 have to think about it in the sense that what is
19 society? And society is the neighborhoods and the
20 community we live in. It's also our family members.
21 It's the people that we interact with. And to some
22 degree society is ourselves. And when I think about who
23 am I protecting by the sentence, I'm -- I'm not going to
24 grant an unsupervised probation or a release from
25 probation. I can't do that. I have no confidence that

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1 a new place, although that can be helpful, but there's
2 drugs in Massachusetts. And the problems that
3 Ms. McMillan has won't disappear upon crossing state
4 lines into Massachusetts. Those same thing -- the same
5 personality, the same thought patterns, those same
6 things will be there. And trouble can be there as well.

7 So I worry that if I do a discharge from
8 probation or just terminate it and let her go to
9 Massachusetts that the next thing I'm going to hear is
10 an overdose death or something like that. And nobody
11 wants that.

12 Also, I just don't -- I just can't abide by
13 that in terms of other people that are on probation as
14 well with this kind of a record and this kind of a
15 history. Other people on probation would never take it
16 seriously if we just said, well, you've just never
17 completed anything here on probation, so we're just
18 going to let you go. There would never be any reason
19 for anybody to complete probation.

20 So because of that I'm simply going to impose
21 the sentence. It's going to be a five-year sentence,
22 two years fixed followed by three years indeterminate,
23 without a retained jurisdiction. I do that not because
24 I don't think Ms. McMillan would try on a rider. She's
25 always tried before. But the rider program needs to be

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1 for those people -- I mean a third rider needs to be an
2 extraordinary thing. That's taking up that space from
3 someone who needs a first one or needs a second one.
4 And I just don't think that's an efficient use.

5 My hope is -- my thought is this is a terrible
6 thing for the Court to do because -- it's small
7 consolation to Ms. McMillan -- but she has always seemed
8 like such a nice young lady. And it's sad to do this.
9 But my hope is that at some point the bottom is met and
10 that the time for change becomes a real time. And maybe
11 on parole is the time to do it.

12 Massachusetts may be an option on parole. I
13 don't know. But it wouldn't be an option on probation.
14 I just doubt that an interstate compact would take you
15 with this history of absconding now. I don't know if it
16 will be an option on parole or not. But the Court sees
17 little other choice. So with that I do impose this
18 sentence and revoke the probation.

19 Are there any questions from the State?

20 MS. GARDNER: No thank you, Judge.

21 THE COURT: Are there any questions from the
22 defense?

23 MR. CHAPMAN: Certainly it's statutory, but
24 she's entitled to all time served in this matter.

25 THE COURT: The judgment will indicate she's

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